because he has not proved that he was a *bona fide* purchaser for value without notice; and without such proof the Court ought not, in my opinion, to presume that the second chargee was such a purchaser.

I wish to emphasise once more that though the Land Enactment, 1910, has been amended at least 10 times, and though an amendment passed in 1933 introduces, in section 90H, an express exception "in the case of fraud to which the purchaser is proved to be a party," and gives overriding protection, on a [212] sale of land under [212] section 83, to the "proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from such purchaser," yet the Enactment contains no provision extending this protection in other circumstances and no provision referring to indefeasibility of title or State warranty of title. In my opinion the Court must conclude that the exception and the protection specified in section 90H shall apply only to the special circumstances with which that section deals, and must conclude that the Legislature did not intend to make provision for indefeasibility of title or for State warranty of title in general.

I have endeavoured to give full appreciation to all points raised on behalf of the chargees, but I must admit difficulty in extracting the substance of long and involved arguments interwoven with continuous references to foreign laws and foreign decisions.

In particular I have examined the interesting cases cited by counsel for the third defendant in support of the position that forgery is not always a nullity; but I am satisfied that there is nothing in those cases which will substantiate the claims of the claims of the chargees under the circumstances now before the Court.

At the risk of being tedious I am obliged to stress the fact that it is the Johore Land Enactment, 1910, which regulates the rights of the parties; just as the Court of Appeal in the Federated Malay States points out that the English Land Transfer Acts are not modelled closely on the Australian Acts and that the Negri Sembilan Enactment does not substantially differ from the Australian Torrens Acts (*cf.* 1 F.M.S. Law Reports at pp. 332 and 335), so I must point out that the Johore Land Enactment, 1910, is not modelled closely on the Australian Torrens Acts and does substantially differ from them.

On the whole case my conclusion is that the claims of Tan Keng Neo and therefore of the substituted plaintiff Quah Hong Lian Neo ought to be preferred to those of the chargees.

The Court has a discretion under the Specific Relief Enactment to grant or refuse the equitable relief which is asked for, but in my opinion no sufficient reason has been shown to justify the Court in refusing it; nor would such refusal be of any advantage to the defendants, since, if I am right in holding that the transfer and charges are a nullity, the defendants could not successfully sue on those documents.

On the 20th April, 1936, I delivered a formal judgment specifying the relief to which, in my opinion, the plaintiff was entitled, and making an order as to costs by agreement between the parties.

One other question remains, whether the Court ought to order the plaintiff to repay the chargees the sums advanced upon the charges.

In my opinion the answer must be in the negative; for three reasons:—

1. In considering which of two innocent parties ought to suffer, I have decided that the claim of Tan Keng Neo ought to be preferred; it would stultify that decision if I now ordered the loans to be repaid, for such an order would remove the burden of suffering from the shoulders of the chargees and impose it on the shoulders of the plaintiff;

2. Tan Keng Neo has not been guilty of any negligence amounting to a neglect of duty and therefore ought not to be saddled with any responsibility for the loss which the chargees have incurred through the transaction, *cf.* the judgment of Innes J.C. in *Lim Pang Geok* v. *N. M. A. Sokalingam Chetty,* reported in *Innes'* A Short Treatise of Registration of Title in the Federated Malay States;

3. I feel bound to follow the rule in *Farhall* v. *Farhall,* (7 Chancery Appeals, p. 123) which lays down that when an executor borrows money on behalf of an estate, the executor and not the estate is liable to repay the debt; if the estate of Seow Eng Tin is not legally liable to repay the moneys borrowed by the attorney of the executrix from the chargees, I do not think the Court would be justified in ordering that the chargees should receive compensation from the plaintiff who now represents the estate.

Judgment accordingly.

Solicitors: *Drew & Napier; Sisson & Delay; Pillai & Co.*

---

[213] STRAITS SETTLEMENTS REPORTS [213]

PUBLISHED BY AUTHORITY

VOO FOOT YIU v. OVERSEA CHINESE BANKING CORPN., LTD.

[O.C.J. (Whitley Ag C.J.) July 3, 1936]
[Singapore Suit No. 547 of 1935]

Banker's deposit — Necessity of return of receipt before deposit can be withdrawn.

The form of banker's deposit receipt commonly issued by bankers in Singapore provides that the money deposited is only to be paid out to the depositor on production of the deposit receipt, the words used being "repayable on production of this receipt."

A deceased person during her lifetime deposited money with the defendant bank. After her death letters of administration were granted to one Yip Swee who fraudulently represented that he was the deceased's husband and as administrator of the deceased he then demanded payment of the money due from the defendants on the deposit receipt. The defendants paid him as administrator. The letters of administration granted to him were subsequently recalled. A new grant was made to the husband of the lawful daughter of the deceased who then sued the bank for the money; she produced the receipt.

Held: that the defendants were not entitled to pay the former administrator in the absence of the deposit receipt.

TRIAL OF ACTION.

Davies for the plaintiff.

Vaux for the defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Whitley Ag. C.J.: The facts in this case are not in dispute. Wan Toh Koh died at Singapore on the 16th October, 1932, leaving her surviving an only lawful daughter, Yap Kiat Lim who had married the plaintiff in December 1931. On the 31st October, 1932, one Yip Swee obtained a grant of letters of administration to the estate of the deceased by falsely representing that he was the lawful husband of the deceased. On the 3rd February, 1933 letters of administration to the estate of the deceased were granted to the plaintiff. On the 20th November, 1933, by an order of Court it was adjudged that Yap Kiat Lim is the lawful daughter of the deceased and by another order of Court dated the 1st December, 1933, the letters of administration to Yip Swee was cancelled.

It will thus be seen that from the 31st October, 1932, until the 1st December, 1933 Yip Swee was, as the result of his fraud, in the position of legal personal representative of the deceased and as such on the 25th January, 1933 he obtained from the defendants as the successors of the Ho Ho Bank Limited repayment of two sums of $1,000 each which the deceased had deposited with the Ho Hong Bank on the 21st and 22nd September, 1932, that is to say shortly before her death.

In July 1935 the plaintiff as administrator applied to the defendants for payment of these two sums and interest and, payment being refused, he brought this action claiming payment of the same as money deposited or alternatively damages from breach of contract.

The defendants admit liability for the debts properly due and owing by their predecessors but contend that they are not liable for these two sums inasmuch as they repaid the same to the person who was at the date of repayment the legally constituted administrator of the deceased's estate. It is not suggested that they acted otherwise than *bona fide* in making this payment.

The case is thus one of those unfortunate ones in which one of two innocent parties has to suffer for the misdeeds of a third party.

The plaintiff founds his claim upon the deposit receipts which were handed to the deceased at the time the money was deposited. The first one reads as follows:—

> "Received this 21st day of September, 1932, from Madam Wan Toh Koh Dollars One thousand only to be placed on deposit for six months bearing interest at the rate of 3% per one hundred dollars per annum and repayable on production of this receipt.
>
> THE HO HONG BANK LIMITED."

The second one is identical except that it is dated the 22nd September, 1932. Both are crossed with the words "Not transferable."

Mr. Davies for the plaintiff contended that these receipts constitute an agreement between the bank and the depositor whereby the bank undertook that they would only pay out the money on production of the deposit receipt and the depositor undertook to produce the receipt when demanding repayment of the money. He relied upon the case of *Atkinson* v. *The Bradford Third Equitable Benefit Building Society,* 25 Q.B.D. 377. In that case *A.* lent money to a building society upon the terms, in writing, that the sum lent should be repayable after the lender had given notice of his intention to withdraw it, and that no money would be paid out by the society, except on production by the lender personally or by some one with his written authority, of a loan pass-book given to him when the loan was made and it was held that the condition as to the production of the book was a condition precedent to the liability of the society to repay the money; so that, until that condition had been complied with, the statute of limitations did not begin to run against the lender. Mr. Vaux for the defendants sought to distinguish that case on the groundst hat the wording of the condition there was stronger and that in the [214] present case the words used are "repayable on production of this receipt" and not "repayable only on production of this receipt" but in my opinion the intention must have been that the word "only" should be read into the condition which would otherwise be meaningless. In his judgment Lord Esher M.R., *ibid.*, at p. 380 stated the position as follows: [214]

> "In this case the contract made between the deceased and the society was completed at the moment when the money was deposited with them. It is not disputed that when that was done he received a book and a copy of the rules from them. The book contains the contract between them. It contains the terms, in writing, to which both parties had agreed, and the deceased accepted it as shewing the terms upon which he was to receive back his money. The contract is that the depositor will lend his money to the society on the terms that they shall return it to him when certain stipulations have been fulfilled."

As Lindley L.J. observed the rights of the parties were governed by the special contract which they had entered into. The position must be the same in the present case.

It would seem clear that if the production of the receipt is by agreement of the parties, express or implied, made a condition precedent to withdrawal or repayment, garnishee proceedings would not lie against the deposit account. (See *Paget's* Law of Banking, 4th ed., p. 89). It may be, as Mr. Vaux contended, that the bank could not refuse to pay in the event of the receipt being lost but, as Mr. Paget points out on the same page of his book, that does not affect the question, being merely part of the equitable jurisdiction with respect to lost instruments and the real question is what was the contract between the parties, as evidenced by the receipt. In *In re Tidd,* [1893] 3 Ch. 154 North J. appeared to understand Lord Esher's words in *Atkinson's* case, which I have already quoted, as pointing to the necessity of the return of a receipt such as this before the deposit can be withdrawn.

There is no evidence in the present case that the receipts were lost, in fact we know they were not lost as they are exhibits in the case. We know that the defendants obtained an indemnity from Yip Swee which would suggest that they realised that they might be called upon to pay someone else.

It is contended that the defendants cannot be liable as they paid the money to the person then entitled, namely, the administrator of the estate duly

appointed by the Court and that, as soon as they so paid the money, the debt became extinguished, and it does not matter what were the conditions of the contract.

Mr. Davies admitted that if the receipts had been produced the plaintiff would probably have had no case against the bank even though they paid the money to a person who obtained it by deceiving first the Court and then the bank. But it seems to me that when there is a condition precedent contained in the contract made at the time of the deposit the bank takes a risk if it fails to carry out that condition. The risk may be a very slight one but the fact that an indemnity was obtained seems to indicate that the existence of some risk was appreciated. In this case the risk has materialised since it transpires that the person who at the time occupied the position of legal personal representative had acquired that status by practising fraud upon the Court.

I cannot see how the plaintiff's claim can be refused. The deceased deposited money with the bank on the terms of a written agreement. One of those terms entitled her to think that as long as she kept the deposit receipts in her possession her money was safe and would not be paid out to anyone else. She kept those receipts in her possession and in due course her legal personal representative, the plaintiff, produced them to the bank when demanding payment on behalf of the estate. As far as the plaintiff is concerned it matters not that some third person by fraud obtained the money from the bank nor that the bank was entitled to regard that person as the person legally entitled. The deceased and her representative have carried out every part of the contract which the deceased made with the bank whereas the bank have failed on their part to carry out one of the conditions precedent. I have the utmost sympathy for the defendants who have been victims of a clever fraud, but in my opinion the plaintiff has made out his case for damages for breach of contract and his claim must succeed. There will be judgment for $2,000 and interest as claimed and costs.

Judgment accordingly.

Solicitors: *Aubrey Davies & Co.; Rodyk & Davidson.*

CH'NG KIM HUAT v. HAMBURG-AMERIKANISCHE PACKETFAHRT-AKTIEN GESSELSCHAFT

[O.C.J. (Adrian Clark J.) July 6, 1936]
[Singapore Suit No. 256 of 1936]

Shipping and Navigation — Collision — Damage — Proceedings at Common Law — Filing of Preliminary Acts — Dispensation of.

In an action at common law for damages for the loss of a tongkang as a result of its collision with a steam vessel, it is unnecessary to file Preliminary Acts as required in Admiralty Suits.

SUMMONS IN CHAMBERS.

Spenser Wilkinson for the plaintiff (applicant).

[215] *Battishill* for the defendants (respondent).

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Adrian Clark J.: The substantial point raised in this summons is whether or not it is necessary for the parties to file Preliminary Acts in the suit in which the summons has been taken out.

The plaintiff in the suit claims damages for the alleged loss of his tongkang as the result of a collision with the s.s. *Scheer* of the Hamburg Amerikanische Packetfahrt Actiengesellschaft. The collision is alleged to have taken place on the 15th April, 1936 off St. John's Island which is within the harbour limits of Singapore.

The local agents for the Hamburg Amerika Company, the Straits Java Trading Company, having immediately given an undertaking to satisfy any judgment that might be given against the Hamburg Amerika Coy., it became unnecessary for the plaintiff to take any steps which would result in the arrest of the *Scheer* and she thereupon sailed away.

In these circumstances the plaintiff, on the 10th June, 1936 issued a writ against the Hamburg Amerika Company addressing the writ to the company as "carrying on business within the Colony by their agents the Straits Java Trading Co. N.V. of Nos. 132/136 Robinson Road, Singapore."

This writ was taken out intituled and entered in the cause book as an ordinary civil action and not as an Admiralty Suit.

Service of this writ was accepted by Messrs. Sisson & Delay who duly and without protest entered appearance for the Hamburg Amerika Company as defendants.

The memorandum of appearance contains a notice that the defendants require the plaintiff to file and deliver a claim. Nevertheless, in correspondence between the solicitors for the plaintiffs and those for the defendants, the defendants claimed and the plaintiff denied that it was necessary that Preliminary Acts should be filed, and this summons was therefore taken out in order to settle that point.

The original civil jurisdiction of the High Court of this Colony, under section 11 of the Courts Ordinance, 1934, includes the jurisdiction and authority, within the Colony, which was formerly exercised by the Courts of Queen's Bench, Common Pleas and Exchequer in England, and also the jurisdiction and authority of a Colonial Court of Admiralty conferred upon it by the Colonial Courts of Admiralty Act, 1890.

Section 2 of the Act of 1890 conferred on Colonial Courts of Admiralty, broadly speaking, the same jurisdiction as was then possessed by the High Court in England in its Admiralty jurisdiction and sub-section (4) of that section provided that where any Court in a British possession exercises in respect of matters arising "outside the body of a county or other like part of a British possession" any jurisdiction exercisable under the Act that jurisdiction shall be deemed to be exercised under the Act and not otherwise. Had the collision, in this case, occurred on the